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No. 91-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STROH BREWERY COMPANY,
Petitioner,

v.

DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

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REPLY TO BRIEFS IN OPPOSITION

Of Counsel:
JOHN T. PORTER
JOHN T. PORTER, P.A.
Albuquerque, NM
GEORGE E. KUEHN
THE STROH BREWERY COMPANY
Detroit, MI

February 3, 1992

JOHN J. MCAVOY
Counsel of Record
CHRISTOPHER M. CURRAN
JOSEPH H. HUNT
WHITE & CASE
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 872-0013
Attorneys for Petitioner
The Stroh Brewery Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY TO BRIEFS IN OPPOSITION

Stroh respectfully replies to Respondents' briefs in opposition.[1]

ARGUMENT

I. APPLICATION BY THE MAJORITY BELOW OF LAW OF THE CASE IS NOT A "PROCEDURAL BAR" TO THIS COURT'S REVIEW

Respondents err in asserting that the decision by the New Mexico Supreme Court was "primarily based on a state issue" (Dir. Opp. 2) and that "[t]he federal retroactivity question is merely a side issue" (Whlrs. Opp. 3). As plainly evidenced by the majority, concurring and dissenting opinions, the decision below in fact turned on whether this Court's decision in *Healy* v. *Beer Institute*, 491 U.S. 324 (1989) (*"Healy II"*), applies retroactively.

[1] In this Reply, the brief in opposition filed by Respondent Director is cited as "Dir. Opp." and the brief in opposition filed by Respondents Wholesalers is cited as "Whlrs. Opp." Stroh's petition is cited as "Pet."

The majority below determined (erroneously) that *Healy II* does *not* apply retroactively and, seeing no reason to deviate from its earlier (pre-*Healy II*) ruling in this case, then applied the law of the case. Had a majority below determined (correctly—as the dissenters would have) that *Healy II does* apply retroactively, that majority presumably would have accepted that under the Supremacy Clause it was required to apply *Healy II* in this case.[2]

Respondents' portrayal of the decision below as grounded on New Mexico's law-of-the-case doctrine is as misguided as it is misleading, for it gets Respondents nowhere. A steady line of decisions by this Court has rejected the argument—advanced here by Respondents (Dir. Opp. 2-10, Whlrs. Opp. 6-10)—that a lower court's application of law of the case is a "procedural bar" to this Court's review. Even a mere sampling of those decisions establishes beyond a doubt that this Court may review all federal issues determined at any stage of the proceeding below despite a lower court's application of law of the case.

In *Davis* v. *O'Hara*, 266 U.S. 314 (1924), this Court unanimously held: "The ruling that the former decision of the state court became the law of the case does not affect the power of this Court to re-examine the question." 266 U.S. at 321 (citations omitted). In *Reece* v. *Georgia*, 350 U.S. 85 (1955), this Court (again unanimously) held: "We have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, and our right to reexamine such questions is not affected by a ruling that the first decision of the state court became the law of the case." 350 U.S. at 87 (citations omitted). In *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), this Court held:

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[2] Selectively quoting passages of the majority opinion out of context, the Respondents go so far as to suggest that the majority opinion's expression "the central issue discussed above" (Pet. App. 14a) referred to the law of the case, when it obviously referred to the federal issue of retroactivity. Dir. Opp. 2-10; Whlrs. Opp. 6-10.

"the [State] Supreme Court's subsequent reliance on the law of the case cannot prevent us from reviewing federal questions determined on the first appeal." 457 U.S. at 262 (footnote omitted). In *Pennsylvania* v. *Ritchie*, 480 U.S. 39 (1987), this Court stated: "Law of the case principles are not a bar to this Court's jurisdiction, of course . . . ." 480 U.S. at 49. In *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800 (1988), this Court held: "[L]aw of the case cannot bind this Court in reviewing decisions below. A petition for a writ of certiorari can expose the entire case to review." 486 U.S. 817. Most recently, in *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177 (1990), this Court held that the lower court's reliance on law of the case "does not, of course, bind this Court." 110 S. Ct. at 3185.

One case in this unbroken line of authority, *Turner* v. *Arkansas*, 407 U.S. 366 (1972), is particularly apposite. On a first appeal the Arkansas Supreme Court rejected a federal constitutional argument by a criminal defendant. On a second appeal, the Arkansas Supreme Court declined to reconsider the defendant's federal constitutional argument on law-of-the-case grounds—despite an intervening decision by this Court at odds with the decision on the first appeal. This Court summarily reversed the Arkansas Supreme Court in a *per curiam* decision. 407 U.S. at 370.

The law of the case thus does not insulate from review the failure of the court below to apply a constitutional decision by this Court. Like *Turner*, moreover, this would be an appropriate case for summary reversal if this Court is so inclined.

II. IN LIGHT OF *HEALY II*, THIS COURT'S SUMMARY DISMISSAL OF STROH'S 1984 APPEAL WAS ERRONEOUS AND SHOULD BE RECTIFIED BEFORE THIS CASE BECOMES FINAL

As indicated in Stroh's petition (Pet. 4), on an earlier appeal in this case in 1984—before this Court decided *Healy II*—this Court dismissed Stroh's appeal "for want

of [a] substantial federal question." Respondents assert that this Court's earlier dismissal of Stroh's appeal makes this an improper case for this Court's review now. *See* Dir. Opp. 14-15; Whlrs. Opp. 1-5. The earlier appeal, however, was dismissed summarily on the authority of *Seagram*, which has since been overruled by this Court in *Healy II*. This Court's earlier dismissal of Stroh's appeal does not bar—or even militate against—this Court's review now; if anything, the earlier dismissal makes this a *more* compelling case for review because it presents this Court with an opportunity to correct its earlier summary disposition before this case becomes final.[3]

Under the law of the case, this Court is always free to revisit a ruling it made earlier in the same case. As Justice Holmes said for this Court in *Messinger* v. *Anderson*, 225 U.S. 436, 444 (1912), the law of the case "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." In *Arizona* v. *California*, 460 U.S. 605, 618 n.8 (1983), this Court reaffirmed Justice Holmes's classic statement and added: "Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injus-

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[3] While this Court did not explain its 1984 conclusion that the appeal lacked a "substantial federal question," the conclusion obviously was grounded on the controlling authority of *Seagram*. First, the Supreme Court of New Mexico had based its decision on *Seagram*. *See* Pet. 4; Pet. App. 4a. Second, in the motion for summary dismissal that this Court granted, Respondent Director argued that this case did not present a substantial federal question because *Seagram* controlled: "This case is factually and legally identical to *Seagram*. The New Mexico Supreme Court unerringly followed the command of this Court in upholding New Mexico's [1979] Discrimination in Selling Act." Motion of Appellee to Dismiss or Affirm at 6, Nos. 83-911, 83-927 (Jan. 25, 1984). Finally, in an opinion concurring with this Court's summary dismissal of Stroh's appeal, Justice Stevens similarly viewed *Seagram* as controlling. 465 U.S. 1093, 1093-94 (1984).

tice." *See also Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (under law of the case "[a] court has the power to revisit prior decisions of its own . . . in any circumstance").[4]

This Court should be particularly inclined to revisit its summary dismissal of Stroh's 1984 appeal because such summary dispositions are of limited precedential effect. This Court has held that the "cursory consideration" it accords a federal question in summarily disposing of an appeal "does not, of course, foreclose [the] opportunity to consider more fully that question." *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 308-09 n.1 (1976). Indeed, in *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490 (1981), this Court declared:

> As we have pointed out, . . . summary actions do not have the same authority in this Court as do decisions rendered after plenary consideration. They do not present the same justification for declining to reconsider a prior decision as do decisions rendered after argument and with full opinion. "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action."

453 U.S. at 500 (quoting *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979)) (citations omitted).

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[4] Respondents misplace reliance on two cases decided over one hundred years ago—*Tyler* v. *Magwire*, 84 U.S. (17 Wall.) 243 (1872), and *Clark* v. *Keith*, 106 U.S. 464 (1882)—to support their argument that this Court does not have the power to revisit its 1984 summary dismissal of Stroh's appeal. Dir. Opp. 15; Whlrs. Opp. 2-3. The *Tyler* case harkens back to when the common law "term rule" limited a court's power to revisit judgments made in prior terms. The "term rule" was abolished in 1948 by the enactment of 28 U.S.C. § 452, which now reads: "The continued existence or expiration of a session of court in no way affects the power of the court to do any act or take any proceeding." *See generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 619-20 (6th ed. 1986). The *Clark* case has obviously been abandoned over the course of the last century by *Messinger* and its progeny.

Just two weeks ago, this Court reaffirmed its power to revisit an earlier decision in a case; as here, the earlier ruling there was a summary decision. In *Wyoming* v. *Oklahoma*, 60 U.S.L.W. 4119 (U.S. Jan. 22, 1992) a majority of the Justices acknowledged that the law of the case makes an exception where there has been a "change of circumstances, whether of fact or law." 60 U.S.L.W. at 4122. Although the majority declined to reverse the earlier summary decision, it said that "if convinced . . . that we were clearly wrong [earlier], we would not hesitate to depart from our prior rulings." *Id.* The dissenting Justices, who would have reversed the earlier decision, emphasized that it was "disposed of . . . summarily, without oral argument and without opinion." *Id.* at 4126 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J.).

It thus cannot be denied that this Court has the power to reconsider an earlier decision in a case—and should be particularly inclined to do so where the earlier decision was made summarily. Indeed, this Court has exercised such power under similar circumstances. In *Leverson* v. *Conway*, 472 U.S. 1014 (1985), as here, the plaintiff brought an action in state court challenging a state statute as violative of the Federal Constitution. As here, the challenge was unsuccessful in the state courts, *see* 144 Vt. 523, 481 A.2d 1029 (1984), and this Court dismissed "for want of [a] substantial federal question," 469 U.S. 926 (1984). After an intervening decision by this Court on the same issue in another case, however, this Court vacated its summary dismissal in *Leverson* and remanded the case to the state supreme court. 472 U.S. 1014.[5]

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[5] In numerous other instances this Court has vacated its earlier judgment of a case on the merits. *See, e.g., Parker Seal* v. *Cummins*, 433 U.S. 903 (1977) (prior affirmance vacated and case remanded in light of intervening decision of this Court); *Crampton* v. *Ohio*, 408 U.S. 941 (1972) (same); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959) (prior affirmance vacated and case affirmed following reargument); *Ladner* v. *United States*, 358 U.S. 169 (1958) (prior affirmance vacated and case reversed and remanded); *Reid* v. *Covert*,

After this Court's 1984 dismissal of Stroh's appeal, this case was remanded to the New Mexico trial court for further proceedings. Since then, *Healy II* has made clear that Stroh's 1984 appeal raised not only a "substantial federal question" but a meritorious one: *Healy II* has vindicated the claim that Stroh asserted when it instituted this action in 1979 and has advocated consistently ever since. This Court should accord the benefit of *Healy II* to Stroh, which was ahead of its time in recognizing the invalidity of the price-affirmation statutes that flourished under *Seagram*.[6] To deny Stroh relief now would be to give greater effect to this Court's summary disposition of Stroh's 1984 appeal than to the Court's 1989 decision on plenary review in *Healy II*. Moreover, because this case is not yet final, according Stroh the benefit of *Healy II* will not offend any notion of finality.

III. THE ISSUES RAISED IN STROH'S PETITION HAVE BROAD APPLICABILITY AND ARE CLOSELY RELATED TO OTHER CASES ON THIS COURT'S DOCKET

On one level, this is a case about a state trying to collect $20 million under a statute that it concedes is unconstitutional. On another level, however, this case implicates issues that go to the heart of this Court's civil retroactivity jurisprudence, which has been mired in confusion and uncertainty at least since *Beam* brought

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354 U.S. 1 (1957) (same); *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955) (same); *MacGregor* v. *Westinghouse Co.*, 329 U.S. 402 (1947) (same); *Halliburton Oil Well Cementing Co.* v. *Walker*, 329 U.S. 1 (1946) (prior affirmance vacated and case reversed); *Jones* v. *Opelika*, 319 U.S. 103 (1943) (same).

[6] In its Jurisdictional Statement filed in this Court in connection with its 1984 appeal, Stroh suggested that "this Court may wish to reconsider *Seagram*." Jurisdictional Statement, No. 83-911 (Dec. 16, 1983). As indicated above, in its successful motion to dismiss that appeal, Respondent Director argued that *Seagram* controlled because "[t]his case is factually and legally identical to *Seagram*." *See* supra n.3.

into question the continuing viability of *Chevron*. On that level, this case presents this Court with an excellent opportunity to resolve that confusion and uncertainty, which hamper the lower courts as they seek to apply this Court's decisions.

No fewer than three other cases currently on this Court's docket (each "pending conference") also directly address the relationship between *Beam* and *Chevron*: (1) *Pledger* v. *Bosnick*, *pet. for cert. filed*, 60 U.S.L.W. 3173 (U.S. Sept. 3, 1991) (No. 91-375); (2) *Harper* v. *Virginia Department of Taxation*, *pet. for cert. filed*, 60 U.S.L.W. 3406 (U.S. Nov. 15, 1991) (No. 91-794); and (3) *Lewy* v. *Virginia Department of Taxation*, *pet. for cert. filed*, 60 U.S.L.W. 3446 (U.S. Nov. 27, 1991) (No. 91-882). These cases, which concern the retroactivity of *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803 (1989), are highly akin to this case because *Davis*, like *Healy II*, did not explicitly state whether it applied retroactively. *See also Barker* v. *Kansas*, *pet. for cert. granted*, 60 U.S.L.W. 3042 (U.S. Nov. 27, 1991) (No. 91-611) (retroactivity of *Davis* raised below but not resolved in decision below); *Colorado* v. *Kuhn*, *pet. for cert. filed*, 60 U.S.L.W. 3481 (U.S. Dec. 13, 1991) (No. 91-980) (same). If this Court will be addressing retroactivity issues in these cases, or any others, it should grant Stroh's petition as well (or at least hold it for disposition in light of the resolution of such cases).[7]

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[7] While the retroactivity issues in this case are similar to those in the *Davis* cases the reliance interests are not. In the *Davis* cases the plaintiffs seek refunds of taxes paid under a statute later found to be invalid under a federal statute. Here the State seeks to collect money *now* based on a statute that has already been found unconstitutional. (This case also differs from the *Davis* cases in that here Stroh seeks to vindicate a *constitutional* right and not merely a federal statutory right.)

In *Trimble* v. *Gordon*, 430 U.S. 762 (1977), this Court declared unconstitutional statutes that disinherited illegitimate children. When a Texas court denied the benefit of *Trimble* to a litigant on the basis that *Trimble* did not apply retroactively, this Court unanimously reversed in *Reed* v. *Campbell*, 476 U.S. 852 (1986). This

Because this Court typically addresses issues of federal law—constitutional or otherwise—that are unsettled, virtually any decision by this Court announces arguably "new law" and thus raises retroactivity issues. Despite the current confusion as to whether decisions of this Court in the civil area are to be given retroactive effect, the lower courts have no choice but to address the issue. Even in the short period between Stroh's petition and this reply, several new decisions by lower courts reflect their continuing uncertainty in resolving issues of civil retroactivity:

• In *Bass* v. *South Carolina*, No. 23216 (Jan. 27, 1992), the Supreme Court of South Carolina, in declining to apply a decision of this Court retroactively, stated: "We do not read *Beam* as rejecting the *Chevron Oil* test. Four Justices clearly embrace the test's viability in determining retroactivity." Slip Op. at 9 n.4.

• In *Service Oil, Inc.* v. *North Dakota*, No. 910135 (Jan. 9, 1992), the Supreme Court of North Dakota, in giving retroactive effect to a decision of this Court, felt constrained to justify its decision under both *Chevron* and *Beam*.

• In *Rider* v. *San Diego*, 820 P.2d 1000 (Dec. 19, 1991), the California Supreme Court's treatment of a retroactivity issue prompted a dissenter to bemoan this Court's "tortuous path" on civil retroactivity and the "turmoil" caused by *Beam*.

• In *Southwestern Public Service Co.* v. *FERC*, No. 90-1513 (D.C. Cir. Jan. 14, 1992), the court of appeals suggested that *Chevron* is no longer good law when it stated that *Beam* "may forbid . . . selective retrospectivity."

Court found no justification for the state court's declining to apply the controlling law (*Trimble*) at the time of decision. 476 U.S. at 856. Here too, where there were no reliance interests at stake, there was no justification for the state court to decline to apply controlling law (*Healy II*).

• In *Melton* v. *Moore*, No. 91-35080 (9th Cir. Jan. 13, 1992), the court of appeals applied *Chevron*—without mentioning or citing *Beam*—in declining to give retroactive effect to a decision of this Court.

Until this Court clarifies its civil retroactivity jurisprudence—and particularly the status of *Chevron*—the lower courts will continue to take inconsistent approaches and reach inconsistent conclusions in determining whether to give retroactive effect to decisions of this Court.

CONCLUSION

For all of the foregoing reasons and those set forth in the petition itself, Stroh's petition for a writ of certiorari should be granted and (1) the judgment of the Supreme Court of New Mexico should be summarily vacated or reversed, or (2) this case should be set for plenary consideration.

Respectfully submitted,

Of Counsel:
JOHN T. PORTER
JOHN T. PORTER, P.A.
Albuquerque, NM
GEORGE E. KUEHN
THE STROH BREWERY COMPANY
Detroit, MI

February 3, 1992

JOHN J. MCAVOY
Counsel of Record
CHRISTOPHER M. CURRAN
JOSEPH H. HUNT
WHITE & CASE
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 872-0013
Attorneys for Petitioner
The Stroh Brewery Company